

2010 WL 2897276 (Ga.) (Appellate Brief)  
Supreme Court of Georgia.

Madonna WHITUS, Appellant,  
v.  
STATE OF GEORGIA, Appellee.

No. S10A1133.  
June 1, 2010.

**Brief of Appellee**

Patrick H. Head, District Attorney, Cobb Judicial Circuit, Bar Number 341950, John R. Edwards, Assistant District Attorney, Cobb Judicial Circuit, Bar Number 241450, Jesse Evans, Deputy Chief Assistant District Attorney, Cobb Judicial Circuit, Bar Number 252342, Attorneys for Appellee, 10 East Park Square, Marietta, Georgia 30090-9602, (770) 528-3080.

**\*1 STATEMENT OF THE CASE**

Appellant Whitus was tried before a jury and convicted of malice murder, **exploitation** of a disabled adult, two counts of identity fraud, and concealing the death of another.<sup>1</sup> (R1-5-9; R2-541-42, 552-55) The evidence revealed that Whitus killed Kathie Durant with a lethal amount of **doxepin**. Before Ms. Durant died and while she was disabled, Whitus improperly took advantage of Ms. Durant's **financial** resources. Whitus fraudulently used Ms. Durant's identifying \*2 information both before and after Ms. Durant's death. And Whitus interfered with the police investigation by failing to report Ms. Durant's death.<sup>2</sup>

*Summary of State's Arguments*

Contrary to Whitus's first enumeration of error, her ineffective assistance of counsel claim fails under both parts of *Strickland v. Washington*, 466 U.S. 668 (104 SC 2052, 80 LE2d 674) (1984). Under the deficient performance prong, Whitus has not demonstrated that her trial counsel performed inadequately by relying on the psychological reports obtained pursuant to the trial court's order. Regarding *Strickland's* second prong, Whitus has made no showing that those psychological reports reached incorrect conclusions. And Whitus has not shown a reasonable probability that the outcome of her trial would have been different if her trial counsel had sought additional psychological testing.

Contrary to Whitus's second contention, she was not entitled to funds for a second psychological evaluation. Whitus offered no evidence during the motion \*3 for new trial hearing to show that the first evaluation reached an incorrect conclusion, or that her mental condition would likely be a significant factor at trial.

Contrary to Whitus's second contention, the evidence was sufficient to support the jury's verdict under the standard prescribed by *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

**STANDARD OF EVIDENTIARY REVIEW**

Appellee offers the following statement of facts and proceedings based on a construction of the evidence, and every reasonable inference and presumption therefrom, which supports the jury's finding that Whitus is guilty beyond a reasonable doubt of the offenses underlying her convictions. *Johnson v. State*, 269 Ga. 632, 634 (501 SE2d 815) (1998).

### **STATEMENT OF FACTS**

At 63 years-of-age, Kathie Durant was a sad but generous person. She was sad because she suffered from depression. She was generous because she opened her house to a homeless stranger--Whitus. (T3-50; T4-209, 213)

About two years before Ms. Durant's murder in December 2007, Father Eugene Barrette, of Saint Thomas The Apostle Church, asked Ms. Durant to give Whitus a place to stay. (T3-173, 180) Whitus needed somewhere to live while she looked for work. (T3-72) Ms. Durant saw this as an opportunity to help Whitus get back on her feet. (T3-75) She agreed to allow Whitus to stay in the two- \*4 bedroom, two-story condominium with her until Whitus found a job. (T3-88,181-82)

But a job never materialized, and, as time went on, Ms. Durant did not believe Whitus was abiding by their understanding. (T4-214) And there were other problems.

#### *Whitus takes over the house.*

The first problem arose over Whitus's cats. Whitus came to Ms. Durant's home with three cats--they did not like Ms. Durant's dog. Ms. Durant told Whitus that she would have to keep her cats in the backyard. The next day, Ms. Durant's dog was gone. (T3-73-74)

Contrary to Ms. Durant's wishes, Whitus allowed her cats inside the house. (T3-183-84) The number of cats increased, and consequently Ms. Durant's home smelled badly. By December 8, 2007, there were 13 cats in Ms. Durant's house. (T6-242)

In addition, Whitus was abusive to Ms. Durant. (T3-72-73, 184) Ms. Durant told Father Barrette that Whitus would call her things that Ms. Durant had never been called in her life. (T3-184) In April 2007, this became so bad that Father Barrette packed up Whitus's belongings and took her to a shelter. (T3-185-86) But later Ms. Durant called Father Barrette and asked him to bring Whitus back. Ms. Durant did this out of concern for Whitus. (T3-188-89)

\*5 Still the situation did not improve. During the summer of 2007, Ms. Durant complained about Whitus's anger and bad temper. Whitus would still yell and curse at Ms. Durant. (T4-214) There were also issues over Whitus using Ms. Durant's car. (T4-214) Three weeks before Ms. Durant's death, a neighbor witnessed Whitus yelling obscenities at Ms. Durant as Ms. Durant sat on the passenger side of her car. During this episode, the neighbor saw Ms. Durant sitting in her car's doorway, vomiting on the ground. (T3-147-48, 159, 162) The same neighbor also observed more trash than usual outside Ms. Durant's condominium. This trash included possessions that were special to Ms. Durant, such as pictures that Ms. Durant had prominently displayed inside her home. (T3-148, 171-72)

#### *December 8, 2007--Kathie Durant is dead.*

Despite this ill treatment by Whitus, as late as the end of October 2007, Ms. Durant was mobile and did not appear incapacitated. (T3-122, 215-16) But by the morning of December 8, 2007, Ms. Durant was dead. (T9-89-90, 272) Around 10:00 that morning, Whitus called Father Barrette and told him she had found Ms. Durant dead. (T3-190) He told her several times to call 911, but Whitus did not do so. (T3-192)

A short time later, Whitus was in a frantic state and called Michael Curtis. She told him that she needed his help, but she did not want him to call the police. (T5-10, 21) Whitus told Michael Curtis that if she called 911, she would be in \*6 trouble. (T5-22) He still encouraged Whitus to call 911, but when he talked to her again that afternoon, she still had not done so. (T5-23-25) Whitus also told him that she gave Ms. Durant drinks and medication before she died. (T5-37)

Whitus talked to Josephine and Aly Poventud and appeared concerned about the police coming. (T3-228) Whitus told them that she had used Ms. Durant's credit card; Whitus worried that this would look bad. (T3-229, 242) Aly Poventud called 911 to report Ms. Durant's death.

#### *Initial Police Investigation*

After receiving this dispatch at 3:06 p.m., Lieutenant Terry McCormick of the Smyrna Police Department was the first officer to arrive at Ms. Durant's home. (T4-25, 27-28) Lieutenant McCormick looked at Ms. Durant and knew her death was not natural. (T4-33) He found her body in an upstairs bedroom lying on the floor at the foot of her bed. She was lying on a shower curtain. (T4-31) Ms. Durant had bruising under her right eye, bruising on her cheek, and dark purple bruising on her entire arm. There was blood coming from her mouth. In addition, her right arm had a [compound fracture](#)--the bone was sticking out of her arm. (T4-32, 55, 88, 107; T6-232, 234; T9-67, 93-94, 98-99) Ms. Durant was wearing only a tank top and an adult diaper. (T4-55) She had formed [bedsores](#) on her back. (T9-64, 97) She appeared to have been dead for some time. (T6-232; T9-61)

\*7 Whitus told police that she had been caring for Ms. Durant. (T4-45, 56; T6-240) She said that Ms. Durant had been bedridden and had been on the floor for about a week. During that week, Whitus said she began putting diapers on her and had put the shower curtain underneath her. (T4-59; T6-240) Whitus also said she gave Ms. Durant coke to drink the night before and then found her dead at about 11:00 a.m. (T4-64; T6-240)

Detective Mitchell Plumb obtained a search warrant for Ms. Durant's condominium. (T-235) The search revealed that Whitus's purse held credit cards and other identifying documents belonging to Ms. Durant. (T4-100, 104; T6-236) Detective Plumb also found a Target receipt dated December 8, 2007, and showing a transaction at 2:00 p.m. (T6-244, 324) There were numerous packages on the stairwell. (T6-245) Three envelopes held large amounts of cash. (T4-102; T7-49) In Whitus's bedroom, police found a notebook with credit card numbers and account balances. (T4-115; T7-50-51) Credit cards belonging to Ms. Durant were also in Whitus's bedroom. (T4-115-16) Police also found a computer in Whitus's bedroom. (T7-66) On a seat in Ms. Durant's Hyundai automobile, Detective Plumb found a velveteen-type bag containing jewelry. (T4-179; T6-238)

#### *\*8 Police search Whitus's computer.*

The police also searched the hard drive of the computer found in Whitus's bedroom. (T5-67-73; T7-66-67) Detective Keith Sherwood retrieved emails, chats, and browsing history. (T5-117-118)

Detective Sherwood retrieved an instant message chat created on September 21, 2007 at 9:00 a.m. Whitus had referenced Ms. Durant, saying, "I am going to kill my [expletive] roommate if she doesn't get off my [expletive]." (T5-106, lines 16-17) In another recovered chat made on November 9, 2009, Whitus said of Ms. Durant, "Well, I made her chill out. Been giving her different meds. Do you know any good medicines to make a person chill out?" (T5-164, lines 16-18)

Detective Sherwood also recovered emails made to an online pharmacy confirming her order for [doxepin](#). (T5-107) And he recovered Google searches made on December 3, 2007, performed under search strings for "[doxepin](#)" and "overdose." (T5-108, 112)

#### *Whitus plunders Kathie Durant's bank account and credit cards.*

After this initial investigation, detectives were able to reconstruct Whitus's activities on December 8, 2007.

After her telephone calls to Father Barrette and Michael Curtis, Whitus backed Ms. Durant's car into a neighbor's satellite dish and then sped off. (T3-152) Her first stop was a Wachovia bank. At 11:43 a.m., Whitus made a \$700 \*9 withdrawal from an ATM, using Ms. Durant's bank account. (XXXXXX) At noon, Whitus attempted to cash a \$55,000 check from Ms. Durant's

bank account to deposit into her own account. (T4-154; T5-173-75, 179-82; T7-117; T8-152, 164) Whitus forged Ms. Durant's signature on this check. (T6-135-36, 148-49, 156, 261)

Next, Whitus used Ms. Durant's debit card at Dunkin' Donuts and at Pet Supermarket, where she purchased catnip, cat litter, a cat scratch, and an automatic feeder. (T6-28, 31-33; T8-164) At 1:16 p.m., Whitus was at Kohl's using Ms. Durant's debit card on a \$61.46 purchase. (T8-164, 166) Whitus tried to use Ms. Durant's credit card for a \$43.63 purchase, but the transaction failed. (T6-19; T8-132, 137, 166) Still at Kohl's at 1:30 p.m., Whitus used another credit card belonging to Ms. Durant to purchase socks for \$39.33. (T6-9, 12, 18-21; T8-166)

Whitus attempted to use this card at Target, but her \$410.18 purchase failed. Whitus then tried to use Ms. Durant's debit card for a \$450.18 purchase, but that transaction also failed to go through. (T5-46-48, 52-53; T8-138, 166) At 2:00 p.m., Whitus used Ms. Durant's Capital One credit card to buy a \$102.28 television. (T8-166) One minute later, she used the same card for a \$60.39 purchase. Shortly after that, Whitus used that card for two food purchases. (T5-54-55; T8-166-167)

**\*10** Finally, Whitus brought a black bag containing Ms. Durant's jewelry to the American Pawnshop and tried to pawn the jewelry. This transaction also failed because the pawnshop owner would not accept the pawn. Whitus was fidgety and preoccupied while in the store, and the owner later recognized her picture in a newspaper and called the police. Whitus had pawned two rings in this pawnshop three months earlier. (T6-35-38)

Whitus also used Ms. Durant's credit cards before the homicide. On December 1, 2007, Whitus used Ms. Durant's debit card at a Chevron and at a Burger King. She also made an online purchase for \$97.94. (T8-155) On December 2, 2007, Whitus placed an internet order for \$125.95. On December 3, 2007, she used Ms. Durant's debit card at Value City for \$110.21 and at Best Buy for \$69.91. She placed one internet order for \$86.85 and a second for \$1,513.56. (T8-157) She also made a catalog order by telephone in the amount of \$416.76. (T8-158) Whitus charged \$19.17 against Ms. Durant's debit card at China Taste on December 4, 2007. The next day, she made three charges to this debit card at a Home Depot, and another charge at Victoria's Secret. (T8-161) Whitus placed another catalog order in the amount of \$81.96 charged to Ms. Durant. (T7-10-11; T8-161) And on December 7, 2007, Whitus charged \$58.93 to Ms. Durant's debit card while at K-Mart. Then, Whitus charged \$35.94 to the debit card at Life Grocery; she charged \$25.20 at Pet Supermarket; she withdrew \$100 from the **\*11** debit card account; and she made a second withdrawal from Ms. Durant's account for \$700. The third attempted withdrawal failed, and Whitus made an inquiry for the balance. (T8-163)

Whitus made these transactions after a police officer caught her with Ms. Durant's credit card. On November 15, 2007, Officer Anthony Montrose of the Smyrna Police Department encountered Whitus in a Kroger store. Whitus had in her possession Ms. Durant's social security card, driver's license, and three checks made out to Ms. Durant for \$1,800, \$14,850, and \$13,050. (T5-219-28) Whitus forged Ms. Durant's signature on the check for \$13,050. (T6-135-36, 148-49, 155; Exhibits to Volume 5, page 246)

#### *Forensic Evidence*

A forensic toxicologist at the state crime laboratory determined that Ms. Durant's blood contained a lethal level of [doxepin](#). (T8-55-56, 65, 67-71, 75) The level of [doxepin](#) in Ms. Durant blood was eight times higher than the highest recommended therapeutic level (T8-71) The medical examiner ruled Ms. Durant's death a homicide caused by [doxepin](#) toxicity. (T9-107)

#### *Whitus Possessed [Doxepin](#)*

Several months after Ms. Durant's death, Rita Gust was cleaning out Ms. Durant's condominium. (T3-117-18) While doing so, Ms. Gust found a bottle of [doxepin](#) hidden on a bookshelf behind some candles. This [doxepin](#) was prescribed **\*12** for Whitus. (T3-89; T6-207, 211, 216; T7-60) Ms. Gust called Detective Plumb and turned the [doxepin](#) over to him. (T3-119; T7-60; T8-49)

Detective Plumb found that Whitus had prescriptions for [doxepin](#). (T4-197, 200; T8-50, 54) Furthermore, Ms. Durant's doctor had not prescribed [doxepin](#) for Ms. Durant. [Doxepin](#) would have been dangerous for her because she had a heart condition. (T4-216; T9-127)

The State will include additional facts as necessary in argument.<sup>3</sup>

## ARGUMENT AND CITATION OF AUTHORITY

### ENUMERATION OF ERROR ONE

#### WHITUS'S TRIAL ATTORNEY PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL

Whitus contends her trial counsel provided ineffective assistance of counsel. Specifically, Whitus asserts that her attorney did not obtain a full forensic evaluation. (Appellant's Brief, 20-21) Whitus has not shown that her trial counsel's conduct was deficient, or that there is a reasonable probability that any \*13 alleged deficiency altered the outcome of her trial. Whitus's claims of ineffective assistance do not meet the standard established by [Strickland v. Washington](#), 466 U.S. 668.

#### *Strickland's Two-Part Test*

*Strickland* established a two-part test for evaluating a claim of ineffective assistance of counsel. *Id.* This test requires Whitus to prove deficient performance on the part of her trial counsel and to show a reasonable probability that the deficient performance resulted in actual prejudice. [Harris v. State](#), 279 Ga. 304, 306 (3) (612 SE2d 789) (2005). To satisfy the first prong of this test, Whitus must demonstrate that her attorney's performance was unreasonable considering all the circumstances. [Strickland](#), 466 U.S. at 688. This showing must overcome the strong presumption that counsel's performance fell within a wide range of reasonable professional conduct. [Harris](#), 279 Ga. at 306 (3). Furthermore, the reviewing court must examine the questioned performance from counsel's perspective at the time of trial and not by hindsight. [Strickland](#), 466 U.S. at 689.

Under *Strickland's* second prong, Whitus must show there is a reasonable probability that, but for any unprofessional errors, the result of her trial would have been different. [Miller v. State](#), 285 Ga. 285, 286-87 (676 SE2d 173) (2009) (prejudice prong requires showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been \*14 different). This prejudice prong only becomes relevant after a showing of deficient performance. If either prong is not established, the appellate court need not consider the other part of the two-prong test. [Sanders v. State](#), 281 Ga. 36, 39 (3) (635 SE2d 772) (2006) (where the court finds there was no prejudice to the defendant there is no need to consider the performance prong of the *Strickland* test); [Igidi v. State](#), 251 Ga. App. 581, 587 (6) (554 SE2d 773) (2001) (a court is not required to address the performance portion of the inquiry before the prejudice component or even to address both components if the defendant has made an insufficient showing on one). To prevail, Whitus must establish both parts: deficient performance and a reasonable probability that the trial would have ended differently. *See Id.*

In the case sub judice, the trial court found that Whitus failed to meet her burden of proof under both prongs of this test. (R2-591-92) These findings are not clearly erroneous.

#### *Standard of Review*

In reviewing a claim of ineffective assistance of counsel, the appellate court will not disturb the findings of the trial judge unless they are clearly erroneous. [Suggs v. State](#), 272 Ga. 85, 88 (4) (526 SE2d 347) (2000). The appellate court will, however, independently apply the legal principles to the facts. [Styles v. State](#), 279 Ga. 134, 136 (4) (610 SE2d 23) (2005) (this court gives

deference to the trial \*15 court's factual finding, unless clearly erroneous, but independently applies the legal principles to the facts to determine the merits of a claim of ineffective assistance of counsel).

### *Circumstances Surrounding Whitus's Representation*

T. Bryan Lumpkin, an experienced criminal defense lawyer, represented Whitus at trial. (R-217; MNT-50) He has handled thousands of felony cases. (MNT-48) See *Cook v. State*, 255 Ga. 565, 578-79 (17) (340 SE2d 843) (1986) (before addressing specific acts and omissions alleged to demonstrate ineffective assistance, it is appropriate to outline generally the circumstances surrounding Appellant's representation).

Mr. Lumpkin began his legal career as an Assistant District Attorney in the Atlantic Judicial Circuit after admission to the Georgia Bar in 1995. (MNT-46) After six years, Mr. Lumpkin began work as an Assistant District Attorney in the Cobb Judicial Circuit. During four of the six years in that position, Mr. Lumpkin was a member of the major case prosecution team, which primarily handled murder cases. (MNT-46-47) In 2005, Mr. Lumpkin left the District Attorney's Office and began a private practice, which is primarily criminal law. (MNT-47-48)

Mr. Lumpkin has tried approximately 80 jury trials during his career. (MNT-49) He tried seven murder trials as a prosecutor and several murder cases \*16 as a defense attorney. (MNT-48-49) He has handled motions in many cases, including death penalty cases. (MNT-49)

While representing Whitus, Mr. Lumpkin filed pertinent motions. He filed a motion to suppress evidence (R1-188-90, 195-203); motions to quash the indictment (R1-191-94, 204-07, 208-11); a motion to suppress evidence of medical records (R1-219-21); and a motion for bond (R1-423-28). The trial court held two days of hearings on Mr. Lumpkin's Jackson-Denno challenge and motions to suppress. (R1-441; **Motions Transcript Volume 1, dated June 2, 2008; Motions Transcript Volume 2, dated June 3, 2008**). Mr. Lumpkin successfully moved the trial court to sever count eight from Whitus's other charges. (R1-444) Mr. Lumpkin received discovery from the State. (R1-21-48, 53-89, 90-104, 105-24, 125-33, 149-54, 177-78, 487-89, 494-96; R2-513-18; MNT-56) He also obtained a preliminary hearing. (MNT-57) And he filed a motion for a psychological evaluation. (R1-455-57; MNT-57)

As part of Mr. Lumpkin's trial preparation, he talked with the prosecutor, interviewed witnesses, and retained an expert witness. (MNT-53, 55, 57, 59, 67) He inspected physical and photographic evidence. He requested and received funds to assist with the defense. (MNT-59) He hired an investigator to assist with preparation. (MNT-50) Several times Mr. Lumpkin visited the crime scene, but could not gain entry. (MNT-53) Mr. Lumpkin felt he had adequate time to \*17 investigate Whitus's case before trial. He spent over 100 hours in pre-trial motions, trial preparation, and meeting with Whitus. (MNT-56)

Mr. Lumpkin met with Whitus over a dozen times. (MNT-50) Mr. Lumpkin and Whitus discussed trial strategy, and she agreed with the strategy Mr. Lumpkin presented at trial. (MNT-51-52, 59-60)

During trial, Mr. Lumpkin participated in voir dire (MNT-54); presented an opening statement (MNT-53); cross-examined the State's witnesses (MNT-54); made objections (MNT-54); moved for a directed verdict (MNT-54; T9-154-65); presented defense witnesses (MNT-55; T9-166-68, 170-73, 176-81, 182-90, 193-97, 198-230, 253-255); filed requests to charge (MNT-55; R2-534-36); and presented a closing argument (MNT-55; T10-18-106).

#### **1. Whitus's trial counsel rendered reasonably effective assistance.**

Whitus's argument that Mr. Lumpkin did not obtain a full forensic evaluation fails to carry her burden of demonstrating unreasonable professional performance. (**Appellant's Brief, 20-21**) This Court has explained that a trial counsel's failure to investigate is unreasonable when it results from inattention as opposed to reasoned strategic judgment. *Terry v. Jenkins*, 280 Ga. 341, 347 (2) (c) (627 SE2d 7) (1998) ("Counsel's failure to investigate is unreasonable where ... it resulted from inattention

and not from reasoned strategic judgment.”). Whitus's trial counsel was not inattentive; he conducted a reasonable investigation into a possible \*18 insanity defense and then made a strategic decision not to pursue an insanity-based defense.

Mr. Lumpkin asked the trial court for a psychological evaluation, and the trial court granted this request. (R1-461-62, 465-66; MNT-57, 64, 66) Mr. Lumpkin was familiar with the psychiatrist who conducted this evaluation and trusted his abilities. (MNT-70-71) The psychiatrist, Dr. Matthew Norman, rendered two reports: one concluded that Whitus was competent to stand trial; the other concluded that she was neither insane<sup>4</sup> nor acting under delusional compulsion<sup>5</sup> at the time of the criminal acts. (MNT-37-38, 68-70, 147-68) By obtaining these medical opinions, Mr. Lumpkin conducted a reasonable investigation of potential insanity defenses. See *Martin v. Barrett*, 279 Ga. 593, 594 (619 SE2d 656) (2005) (“Ordinarily, the lack of investigation into a previous mental hospitalization is \*19 reasonable when an expert has determined that the defendant is fit to stand trial or that he was sane at the time of the offense.”).

In addition, Mr. Lumpkin consulted with Dr. Norman after receiving these reports. (MNT-27, 31, 44-45, 67) Mr. Lumpkin recognized that any attempt to assert a mental health defense would have to confront Dr. Norman's rebuttal testimony. (MNT-73) There was another defense available, because Whitus maintained that she did not kill Ms. Durant. (MNT-43, 52, 79, 96) Mr. Lumpkin concluded that the best defense strategy was to assert innocence as opposed to insanity. (MNT-59-60, 77) And Whitus agreed with this strategy. (MNT-52) *Martin*, 279 Ga. at 593 (“Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...” (quoting *Wiggins v. Smith*, 539 U.S. 510, 521-22, (II) (A) (123 SC 2527, 156 LE2d 471) (2003))). Mr. Lumpkin's decisions were reasonable under the circumstances of this case.

## **2. Whitus has not demonstrated that another psychological evaluation would have shown more favorable conclusions.**

Whitus's ineffective assistance of counsel claim fails for a second reason. Although she produced an expert to testify during her motion for new trial hearing, she offered no evidence showing that Dr. Norman's conclusions were wrong; or that she was incompetent to stand trial, unable to distinguish right from wrong, or \*20 acted under a delusional compulsion. (R1-591; MNT-103) Whitus has not carried her burden under the second prong of the *Strickland* test of showing a reasonable probability that the outcome of her trial would have been different if more psychological testing had occurred. See *Devega v. State*, 286 Ga. 448, 450 (4) (a) (689 SE2d 293) (2010) (even if counsel unreasonably failed to investigate defendant's mental state the defendant still must show a reasonable probability that such an evaluation would have affected the outcome at trial).

During Whitus's motion for new trial hearing, Dr. James Powell, a psychologist, testified as an expert for the defense. (MNT-99, 102) Dr. Powell criticized Dr. Norman's reports, but stopped short of offering an opinion that Dr. Norman reached incorrect conclusions. (MNT-105-15, 124-26) Dr. Powell did no evaluation of Whitus, and he offered no opinion as to her competency or criminal responsibility. (MNT-103, 123, 125) He primarily asserted his opinion that Dr. Norman should have included psychological testing. (MNT-104-07)

Whitus cannot establish prejudice by speculating that an evaluation conducted according to her expert's views might have benefited her defense. *Id.* (speculation is insufficient to satisfy the prejudice prong of *Strickland*). The trial court correctly found that Whitus did not meet her burden on the prejudice prong, because she “offered no new evidence at the hearing on the motion for new trial that [she] actually suffered from a mental illness or insanity either at the time of the \*21 offenses, trial, or sentencing.” (R2-591-92) See *Taylor v. State*, 282 Ga. 693, 696 (2) (b) (653 SE2d 477) (2007) (defendant did not show what the result of a psychological evaluation would be and thus failed to establish prejudice by showing that the result of her trial would have been different if a psychological examination was pursued).

## **ENUMERATION OF ERROR TWO**

### **THE TRIAL COURT CORRECTLY DENIED WHITUS'S REQUEST FOR FUNDS TO CONDUCT AN ADDITIONAL FORENSIC EVALUATION**

Whitus contends that the trial court erroneously denied her post-conviction requests for an order requiring a second forensic evaluation, and for an order to fund the evaluation. (**Appellant's Brief, 20-22**) Although the trial court ordered and funded a pre-trial psychiatric evaluation, Whitus contends that evaluation was incomplete and that additional funds for a second evaluation are necessary. (**Appellant's Brief, 14, 22**) Because Whitus did not demonstrate that a second evaluation would show that her sanity at the time of the offense was likely to be a significant factor at trial, the trial court did not abuse its discretion in denying funds to administer a second psychiatric evaluation.

### *Standard of Review*

The decision to grant a second psychiatric evaluation rests in the trial court's discretion. *Smith v. State*, 245 Ga. 44, 46 (2) (262 SE2d 806) (1980). Absent an \*22 abuse of discretion, appellate courts will not interfere with that determination. *Tolbert v. State*, 260 Ga. 527, 528 (2) (a) (397 SE2d 439) (1990).

### *Appointment of a Psychiatrist*

This Court has held that “the appointment of a psychiatrist is not always necessary, even when the defense makes a motion for appointment of one.” *Lindsey v. State*, 254 Ga. 444, 449 (addendum) (330 SE2d 563) (1985). The defendant must first demonstrate “that his sanity at the time of the offense is to be a *significant factor at trial*.” *Ake v. Oklahoma*, 470 U.S. 68, 83 (I) (105 SC 1087, 84 LEd2d 53) (1985) (emphasis supplied). Once the defendant makes this showing, “the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentations.” *Id.* Furthermore, a defendant does not have a right to choose a psychiatrist of his personal liking. *State v. Grant*, 257 Ga. 123, 126 (2) (355 SE2d 646) (1987).

In *Ake*, the defendant's behavior “was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist.” *Ake*, 470 U.S. at 71. The evaluation concluded that the defendant was delusional, and the psychiatrist recommended a prolonged evaluation to determine competency to stand trial. *Id.* After being committed to a state hospital and medicated, the state psychiatrist found the defendant competent to stand trial, but did not assess his criminal \*23 responsibility. *Id.* The defendant requested funds to hire an independent psychologist to determine his sanity at the time of the offense, and the trial court denied this request *Id.* at 71-72. The United States Supreme Court held that the defendant had made a preliminary showing that his sanity at the time of the offense was likely to be a significant issue at trial, and this required the State to provide the defendant with access to a psychiatrist. *Id.* at 74.

Whitus misinterprets the *Ake* standard by ignoring the requirement that the defendant must first demonstrate that his sanity at the time of the offense will be a significant factor at trial. Whitus failed to make this showing during her motion for new trial hearing. (**R2-589**) On the contrary, her pre-trial evaluation by a court ordered psychiatrist found she was competent to stand trial; she was not suffering from a delusional compulsion at the time of the offense; and she knew right from wrong at the time of he offense. (**MNT-37-38, 68-70, 147-68**)

The Court of Appeals has held that an undeveloped assertion that the requested assistance would be beneficial is not enough to form an appropriate showing that psychological testing is needed. *Davidson v. State*, 183 Ga. App. 557, 558 (2a) (359 SE2d 372) (1987). See *Bright v. State*, 265 Ga. 265, 273-74 (2e) (455 SE2d 37) (1995) (defendant's offering of evidence demonstrating a history of drug abuse, depression, and a troubled family history was not enough to show that his sanity at the time of the offense would be a significant issue at the \*24 guilt phase of trial); See also *Manning v. State*, 259 Ga. App. 794, 795-96 (1) (578 SE2d 494) (2003) (preliminary showing that sanity at the time of the offense is likely to be a significant issue at trial is not satisfied by the mere filing of a motion).

### *Denial of an Independent Psychiatric Evaluation*

“Every person is presumed to be of sound mind and discretion but the presumption may be rebutted.” [OCGA § 16-2-3](#). Whitus offered no evidence to suggest that she was insane at the time of the offense. Moreover, Dr. Norman's evaluation concluded that Whitus was not insane, and that she was responsible at the time of the offense. (MNT-70, 147-68) In making his evaluation, Dr. Norman not only interviewed Whitus, but also read 3,000 pages of discovery. (MNT-67) See [Childs v. State](#), 257 Ga. 243, 248-249 (5) (357 SE2d 48) (1987) (despite a low IQ and a suicide attempt by the defendant, it was not an abuse of discretion to deny funds for an additional psychiatric evaluation where the defendant had previously been evaluated and found to be sane); [Brown v. State](#), 260 Ga. 153, 158 (7) (391 SE2d 108) (1990) (where appellant made no showing to rebut the conclusion of a court ordered psychiatrist that the defendant was sane, it was not an abuse of discretion to deny funds to hire an independent psychiatrist).

### ***\*25 Dr. Norman's Psychiatric Evaluation***

Whitus contends that Dr. Norman did not conduct an appropriate examination. The defense presented a psychologist, Dr. Powell, who testified that he would have conducted Whitus's evaluation in a different fashion. (MNT-105-108) But Dr. Powell never met with or examined Whitus, never examined the 3,000 pages of relevant discovery, and even admitted that Dr. Norman's conclusion that Whitus was competent to stand trial may be correct. (MNT-123-125) Nor did Dr. Powell indicate what psychological testing would show. (MJVT-124)

Dr. Norman's psychological evaluation was not deficient. It addressed both Whitus's sanity at the time of the offense, and her competence to stand trial. (MNT-68, 147-68)

### ***Competency***

Whitus was competent to stand trial.<sup>6</sup> Dr. Norman conducted a psychiatric evaluation of Whitus and concluded that she was competent to stand trial. (MNT- \*26 69, 74) The trial attorney testified that Whitus was able to assist him during the trial and pre-trial motions, that Whitus appeared to understand the proceedings, and that she actively asked questions and discussed matters as they were happening. (MNT-74) Whitus proffered no evidence that suggested she was incompetent to stand trial. (R2-589)

Whitus does not meet the threshold requirement of *Ake*; she made no postconviction showing that her sanity at the time of the offense was a significant factor at trial. Therefore, she was not entitled to an additional psychiatric evaluation.

## **ENUMERATION OF ERROR THREE**

### **THE EVIDENCE AUTHORIZES THE JURY'S GUILTY VERDICTS BEYOND A REASONABLE DOUBT**

Whitus claims the evidence was insufficient to prove malice murder, **exploitation** of a disabled adult by improper use of victim's resources to the profit and advantage of the accused, concealing the death of the victim and the two counts of identity fraud. (Appellant's Brief, 20) Whitus contends that she was shopping when the [Doxepin](#) article was accessed online. She asserts that Ms. Durant suffered depression for years; spoke of her wish to die; and took heavy tranquilizers. Whitus further contends that Ms. Durant refused medical help and \*27 took [Doxepin](#) without Whitus's knowledge. (Appellant's Brief, 20, 22-23) These arguments ignore the applicable standard of review for the sufficiency of evidence.

### ***Standard of Review***

In determining sufficiency of evidence, appellate review looks to whether the evidence is sufficient to enable any rational trier of fact to find guilt beyond a reasonable doubt. [Jackson v. Virginia](#), 443 U. S. 307. The Court will not weigh evidence or attempt

to resolve conflicts in the testimony. *Curinton v. State*, 283 Ga. 226, 228 (657 SE2d 824) (2008) (“[T]his Court does not re-weigh the evidence or resolve conflicts in testimony, but instead defers to the jury’s assessment of the weight and credibility of the evidence.”). Furthermore, the Court construes the evidence in a light most strongly supporting the jury’s verdict. *Phillips v. State*, 279 Ga. 704 (620 SE2d 367) (2005) (construed most strongly in support of the jury’s guilty verdict, the evidence was sufficient to authorize a rational trier of fact to find guilt beyond a reasonable doubt). Under this test, the evidence authorized Whitus’s guilty verdicts beyond a reasonable doubt. (R-245-48)

### *Malice Murder*

OCGA § 16-5-1 (a) provides that “[a] person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.” The elements of murder in Georgia are (1) unlawfully (2) causing the death of another human being (3) with malice \*28 aforethought. Under OCGA § 16-5-1 (b) express malice is defined as that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof and malice “shall be implied where no considerable provocation appears and where the circumstances of the killing show an abandoned and malignant heart.”

“To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.” OCGA § 24-4-6. Reasonableness is a jury question. “Questions as to the reasonableness of hypotheses are generally to be decided by the jury which heard the evidence and where the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, that finding will not be disturbed unless the verdict of guilty is insupportable as a matter of law.” (Punctuation omitted.) *Smith v. State*, 280 Ga. 162 (1) (625 SE2d 276) (2006).

In the present case, electronic records point to Whitus threatening Ms. Durant’s death, chatting about giving her drugs to alter her mood, researching drug overdoses, and ordering *doxepin* online. (T5-106-12, 139, 144, 147, 164)

Dr. Brian Frist performed an autopsy on Ms. Durant on December 8, 2007. (T9-81-82, 84) Dr. Frist found that Ms. Durant died from *drug toxicity*, the result \*29 of *doxepin*, and the manner of death was homicide. (T9-107) It would take about 40 capsules of *doxepin* to reach the *doxepin* level in Ms. Durant’s blood. (T9-147) Ms. Durant did not have a prescription for *doxepin*. Furthermore, *doxepin* interacts poorly with people who have heart irregularities. Ms. Durant had a heart condition. (T9-127)

Ms. Durant ingested the lethal dose of *doxepin* because Whitus fed her drinks laced with this medication. Ms. Durant had no way of taking it herself. (T9-142) Ms. Durant lay on the floor in the same position for days, evidenced by the *bedsores* on the back of her body. (T9-97, 139-40, 143)

Pharmacy records showed Whitus having *doxepin* prescriptions dating back to September of 2007. (T8-50, 54) And Ms. Gust found a prescription bottle, prescribed to Whitus, containing *doxepin* while cleaning Ms. Durant’s house several months after Ms. Durant’s death. (T6-207-208, 216; T7-60) Whitus had been bringing milkshakes and cokes to Ms. Durant. Detective Plumb corroborated this by finding Slim Fast milkshakes in the refrigerator, along with cups in the bedroom. (T7-98-99)

\*30 Joseph Austin, a Georgia Bureau of Investigation forensic toxicologist, tested a sample of Ms. Durant’s blood and found *doxepin*.<sup>7</sup> (T8-56-57, 66-67) Mr. Austin looked at the therapeutic levels for *doxepin* inside a person’s bloodstream when lawfully prescribed. The amount of *doxepin* in Ms. Durant’s blood was eight times that level. (T8-70-71) Ms. Durant’s blood contained a lethal amount of *doxepin*. (T8-75)

This evidence is sufficient beyond a reasonable doubt to prove that Whitus murdered Ms. Durant. Whitus plotted the murder using Internet research and carried out the killing by feeding Ms. Durant a lethal quantity of *doxepin*.

***Exploitation of a Disabled Adult by Improper use of the Victim's Resources to the Profit and Advantage of the Accused.***

"In addition to any other provision of law, the abuse, neglect, or **exploitation** of any disabled adult or **elder** person shall be unlawful." [OCGA § 30-5-8](#) (a) (1). This Court found sufficient evidence to support a conviction for this offense when a defendant befriended an **elderly** person and used the victim's credit cards for unauthorized purposes. *Marks v. State*, 280 Ga. 70, 623 SE2d 504 (2005).

**\*31** Detective Kenneth Spencer looked for transactions on Ms. Durant's credit and debit cards during the time she was physically unable to use them. **(T8-150-51; T9-16)** This period was from December 1, 2007, through December 8, 2007.

Whitus, who identified herself as Ms. Durant's caretaker, made numerous purchases using Ms. Durant's credit and debit cards during this period. On December 1, 2007, she charged Ms. Durant's debit card at a Chevron, a Burger King, and for \$97.94 on an Internet purchase from Swiss Colony. **(T8-155)** On December 2, 2007, she made a Swiss Colony Internet order for \$125.95 on Ms. Durant's debit card. **(T8-156)** On December 3, 2007, she charged \$110.21 at Value City using the debit card. That afternoon, she used Ms. Durant's Wachovia debit card to charge \$69.91 at Best Buy. There were also purchases from Swiss Colony over the Internet for \$86.85 and from Redcats over the phone in Ms. Durant's name for \$416.76. **(T8-156-58)** On December 4, she charged Ms. Durant's debit card \$19.07 at China Taste. **(T8-158)** On December 5, she made charges of \$22.21, \$6.82, and \$57.79 at Home Depot and a charge of \$62.48 to Victoria's Secret. **(T8-161)** On December 7, 2007, she charged Ms. Durant's debit card \$58.93 at Kmart. **(T8-162)**

The evidence was sufficient to prove beyond a reasonable doubt that Whitus committed the crime of **exploitation** of a disabled adult.

***\*32 Identity Fraud***

[OCGA § 16-9-121](#) (a) (1) defines identity fraud as willfully, fraudulently, and without authorization or consent, using or possessing identifying information concerning an individual. [OCGA § 16-9-121](#) (a) (3) defines a separate act of identity fraud committed by a person who "[u]ses or possesses with intent to fraudulently use, identifying information concerning a deceased individual." In defining "identifying information," [OCGA § 16-9-120](#) (4) includes Social Security numbers, credit card numbers, and debit card numbers.

Evidence that defendants stole, forged, and cashed the victim's checks was sufficient to support convictions for identity fraud. *McKenzie v. State*, 300 Ga. App. 469, 471 (685 SE2d 33) (2009) (evidence that defendant accessed the firm's **financial** resources by using its identifying information was sufficient to enable a rational trier of fact to find identity fraud beyond a reasonable doubt).

Whitus was convicted under these statutes for two counts of identity fraud. **(R1-8-9; R2-542, 544)** The evidence is sufficient to support her convictions for identity fraud committed both before and after she killed Ms. Durant.

On November 15, 2007, Officer Montrose caught Whitus with Ms. Durant's social security card and driver's license. Three checks made out to Ms. Durant were also in Whitus's possession. **(T5-219-28)** Nevertheless, Whitus continued to access Ms. Durant's **financial** accounts.

**\*33** On December 1, 2007, Whitus charged Ms. Durant's debit card at Burger King and online for a \$97.94 purchase from Swiss Colony. **(T8-155)**

On December 2, 2007, Whitus made another purchase from Swiss Colony online for \$125.95 on Ms. Durant's debit card. **(T8-156)**

On December 3, 2007, Whitus charged \$110.21 on Ms. Durant's debit card at Value City. That afternoon, Whitus charged \$69.91 on Ms. Durant's debit card at Best Buy. That evening, Whitus made a charge at Ruby Tuesday. That same day, Whitus also charged purchases at Swiss Colony over the Internet for \$86.85 and from Redcats over the phone in Ms. Durant's name for \$416.76. **(T8-156-58)**

On December 4, Whitus charged Ms. Durant's debit card at China Taste for \$19.07. **(T8-158)**

On December 5, Whitus made three charges at Home Depot and one at Victoria's Secret on Ms. Durant's card. **(T8-161)**

On December 7, 2007, Whitus used Ms. Durant's debit card and charged \$58.93 at Kmart. **(T8-162)** In addition, Whitus made ATM withdrawals from Ms. Durant's debit card account in the amounts of \$100 and \$700. **(T8-163-164)**

After Ms. Durant's murder, Whitus continued using Ms. Durant's accounts. On December 8, 2007, Whitus withdrew \$700 from Ms. Durant's bank account using an ATM. **(T5-185)** Whitus deposited a \$55,000 check from Ms. Durant's account into her own account. **(T4-154; T5-173-75, 179-82; T7-117; T8-152, \*34 164)** Whitus then used Ms. Durant's debit card and Capital One Credit Card to make various purchases. **(T5-54-55; T6-9, 12, 18-21, 28, 31-33; T8-132, 137, 164, 166-67)**

### *Concealing the victim's death*

[OCGA § 16-10-31](#) provides: "A person who, by concealing the death of any other person, hinders a discovery of whether or not such person was unlawfully killed is guilty of a felony..." Whitus knew of Ms. Durant's death around 10:00 the morning of December 8, 2007. **(T5-21)** Both Her friend and her priest told her to call 911, but she refused for fear of getting into trouble, choosing instead to spend hours misappropriating Ms. Durant's **financial** resources. **(T5-22)**

Dr. Frist explained the problems arising from the delayed autopsy. Blood must be drawn from a person's heart when the person dies a significant time before the autopsy. This is because the blood congeals, and it can no longer be drawn from the femoral artery, which is the preferred location for the blood sample. **(T9-106, 116, 118)** In those cases, the redistribution phenomenon might occur. **(T9-116)** The phenomenon can cause higher concentrations of medicines because of the blood moving and redistributing itself toward a larger pool of blood. **(T9-115)**

Consequently, Whitus' decision to go shopping while her roommate lay dead hindered the investigation into Ms. Durant's death.

### **\*35 CONCLUSION**

For the reasons set forth in this brief, the State of Georgia, Appellee, through its authorized representatives, respectfully urges this Honorable Court to affirm Whitus's judgment of convictions and sentences.

#### Footnotes

- 1 The five-volume record is referenced (R[vol. #]-[pg. #]). The eleven-volume trial transcript is referenced (T[vol. #]-[pg. #]). Volume one of the motion for new trial transcript, dated February 20, 2009, is referenced (MNT-[pg.#]).
- 2 The jury also found Whitus guilty of felony murder predicated on abuse and neglect of a disabled adult; and abuse and neglect of a disabled adult. (R1-5-9; R2-541-42) The trial court merged the felony murder count and the abuse and neglect of a disabled adult count into malice murder. The trial court also entered a dead docket order on forgery in the first degree. (R2-552, 556)
- 3 The undersigned assistant district attorney, John R. Edwards, recognizes and appreciates the valuable assistance provided in this case by Roxanne N. Mullon of the University of Georgia School of Law, by Gregory J. Gelpi of Atlanta's John Marshall Law School, and by Katherine Davis of Emory University School of Law.

- 4     [OCGA § 16-3-2](#) provides: “A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.”
- 5     [OCGA § 16-3-3](#) provides: “A person shall not be found guilty of a crime when, at the time of the act, omission or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.”
- 6     Inability to “understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense” due to a mental condition may preclude a defendant from facing trial. [Lindsey v. State](#), 252 Ga. 493, 495 (II) (314 SE2d 881) (1984) (quoting [Drope v. Missouri](#), 420 U.S. 162, 171 (95 SC 896, 43 LE2d 103) (1975)).
- 7     Gabapentin, diphenhydramine, norvenlafaxine, doxylamine, and benlafaxine were also present, but only in forensically insignificant amounts. (T8-56-57, 66-68)

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